

DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Small Business Set-Aside Contract Award]

FILE: B-200363

DATE: February 5, 1981

MATTER OF: Hawthorne Uniform Manufacturing Co., Inc.

DIGEST:

DLG05990

1. Bid containing certification that bidder would furnish supplies manufactured or produced by small business concern and name of large business as manufacturer/producer that bidder intended to use on item 4 created, at best, ambiguous bid which requires finding that bid was non-responsive on item 4. Since award provision required award in aggregate, no award should have been made to bidder on any of items in invitation.
2. Since there appears to be no justification for restricting award to one on aggregate basis, other than nominal cost involved in making multiple awards, where agency could have made multiple awards at lesser total price absent aggregate award restriction, procurement should be resolicited on basis of revised award provision.

Invitation for bids No. M3-4-81 was issued as a total small business, labor surplus area set-aside by the Veterans Administration Marketing Division (Hines, Illinois) for the procurement of its October 1, 1980 - September 30, 1981, estimated requirements for durable press uniforms. Hawthorne Uniform Manufacturing Co., Inc. (Hawthorne), protests the award made to Brown's Industrial Uniforms, Inc. (Brown), on the grounds that while Brown certified in its bid that all supplies to be furnished will be manufactured or produced by a small business concern (Brown is a small business regular dealer in, not a manufacturer of, the uniforms), it listed as the "principal place of performance" for the fourth of the four items in the invitation a large business concern. We agree that as submitted the bid

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of Brown was nonresponsive on item 4 and that the award to Brown should not have been made. However, we also believe that the needs of the agency should be resolicited under a revised award provision.

The bid prices of Brown and Hawthorne were as follows:

	<u>Brown</u>	<u>Hawthorne</u>
Total Item 1	\$ 18,564	\$ 25,104.24
Total Item 2	45,942	62,127.72
Total Item 3	48,516	65,608.56
Total Item 4	<u>7,104</u>	<u>8,121.60</u>
Aggregate Total	\$120,126	\$160,962.12
Aggregate Discount	12%	19,315.45
Net Aggregate Price		\$141,646.67

Because of Brown's low, aggregate bid, the company was awarded the contract for all items.

The Hawthorne argument is that in view of the invitation provision entitled "Aggregate Award," the bid should not have been considered for award on any of the items because the Brown bid was nonresponsive on item 4; accordingly, as low bidder (after Brown) on the total number of items, Hawthorne should have received the award on all four items. The "Aggregate Award" provision reads, in pertinent part, as follows:

"AGGREGATE AWARD: It is contemplated that Items No. 1 through 4 will be awarded to the responsible bidder quoting the lowest aggregate price for all items. In the event an aggregate bid is not received for items, the Veterans Administration reserves the right to award on either an item basis or to the lowest responsible bidder quoting the lowest aggregate price on not less than 50 percent of the items in the group, whichever is more advantageous to the Government. Bids will be evaluated on the basis of additional cost to the

Government that might result from making multiple awards. For this purpose, the cost of awarding and administering each additional contract is estimated to be \$50.00. Multiple awards will not be made unless there is a resultant savings of more than \$50.00. * * *

It is the position of the contracting agency that Brown's certification concerning supplies to be furnished should control, since the information (manufacturer/producer's name and address) required of each bidder in the invitation "Principal Place of Performance" provision is merely informational and Brown notified the agency after bid opening that the manufacturer/producer for item 4 would be changed to the same small business which Brown had listed for items 1-3. Thus, the agency argues that the award to Brown was proper.

Brown does not contest that the manufacturer/producer that it listed in its bid for item 4 is a large business concern. Consequently, while Brown certified that the supplies it would furnish would be manufactured or produced by a small business concern, it also stated that the manufacturer/producer for the supplies on item 4 would be a large business. At the very best, these contradictory statements created an ambiguity as to what Brown was promising, and that ambiguity required the rejection of the bid as nonresponsive. See for example Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD 149, where we said:

"This Office has consistently held that where a bid on a total small business set-aside fails to establish the intention of the bidder to furnish products manufactured or produced by small business concerns, the bid is non-responsive and the bidder is ineligible for award. * * * A small business may subcontract work to a large business concern as long as the small business makes a significant contribution to the manufacture or production of the contract end item. * * * However, if an examination

of the bid by a contracting officer indicates that the bidder intends to furnish contract end items manufactured by a large business concern, the bid is properly rejected as nonresponsive. * * *

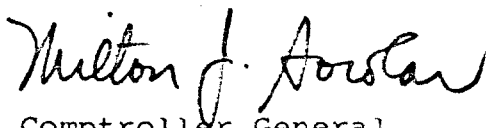
"Culligan certified that it was a small business concern and that the resins would be manufactured by a small business concern, but also stated that the resins would be manufactured, inspected, packaged and shipped by * * * a large business concern. Culligan has not contested this fact. It is apparent from the bid that Culligan did not intend to make a significant contribution to the manufacture of the contract end item, and rejection of Culligan's bid under the unamended IFB as nonresponsive would have been required. * * *"

Based on the reasoning of the cited case, we must conclude that Brown's bid for item 4 showed that the company did not intend to make a significant contribution to the manufacture of item 4 and Brown's bid for the item should have been regarded as nonresponsive.

Thus, we disagree with the contracting agency's conclusion that the information concerning the place of performance for item 4 of Brown's bid could be disregarded as "purely informational," especially since Brown changed the place of performance for item 4 after bid opening. In this connection, we have long held that to permit a bidder to make its nonresponsive bid responsive after bid opening would be tantamount to permitting it to submit a new bid and may not be permitted. Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207. Thus, Brown's request to change its place of performance for item 4 should have been disregarded. Moreover, inasmuch as the "Aggregate Award" provision stated the intention of the contracting agency only to make an aggregate award, unless no aggregate bid was received (here all bidders bid on an aggregate basis), the nonresponsiveness of the Brown bid on item 4 should have precluded the award of any of the other items to Brown also.

Notwithstanding the above, we do not believe that an award to Hawthorne would be permissible under the facts of record. Rather, it is our view that the procurement should be resolicited on the basis of a revised award provision and that Brown's contract should be terminated when the contracting agency is in a position to award a new contract. We so conclude since there appears to be no reason for the aggregate award provision specified here other than the cost of making multiple awards--stated to be only \$50 for each additional award. Under these facts, the use of the aggregate award provision to permit an award to Hawthorne--the low, responsive, aggregate bidder--would constitute an unwarranted restriction on the maximum practicable competition requirement stated in section 1-1.301-1 of the Federal Procurement Regulations (1964 ed., amend. 83), since it would result in an aggregate award at a price higher than that obtained from making more than one award. See generally B-179253, October 4, 1973; Com-Tram of Michigan, Inc., B-200845, November 28, 1980, 80-2 CPD 407. Here, of course, had the award provision been unrestricted, Brown's low bid on items 1-3 could have been accepted, notwithstanding the company's nonresponsive bid for item 4. The award to Brown for items 1-3 and an award to the lowest bidder for item 4 (a company other than Hawthorne) would have resulted in a lower total price--by about \$20,000--than the price of an aggregate award to Hawthorne. Thus, we recommend that the procurement be resolicited for the remaining requirements involved here.

The protest therefore is sustained.


Fot the Comptroller General
of the United States